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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 BRIDGETTE JEFFRIES, as Guardian for
10 MELVIN EASON, an incapacitated person,

11 Plaintiff,

12 v.

13 UNITED STATES OF AMERICA, d/b/a
14 G.V. (SONNY) MONTGOMERY
15 VETERANS AFFAIRS MEDICAL
16 CENTER,

17 Defendant.

18 No. C08-1514RSL

19 ORDER DENYING MOTIONS FOR
20 PARTIAL SUMMARY JUDGMENT

21 I. INTRODUCTION

22 This matter comes before the Court on “Plaintiff’s Motion for Partial Summary Judgment
23 Under FRCP 56,” Dkt. #9, and the “United States’ Motion for Partial Summary Judgment,” Dkt.
24 #8. Plaintiff seeks summary judgment on the issue of defendant’s liability for medical
negligence, claiming that defendant’s agents breached national standards of care in treating
Melvin Eason’s anticoagulation issues and thereby proximately caused his debilitating stroke.
Defendant, meanwhile, seeks partial summary judgment limiting the damages plaintiff may seek
to recover. The Court held oral argument on the motions on September 21, 2009. For the
reasons set forth below, the Court denies both motions.

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26 ORDER DENYING MOTIONS FOR
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II. DISCUSSION

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A. Background

3 Melvin Eason, a Vietnam veteran, has an extensive history of medical problems,
4 including several strokes associated with venous thromboembolic disease, a condition causing
5 blood clots. Between 1978 and 2006, Mr. Eason received medical care from the G.V. (Sonny)
6 Montgomery Department of Veterans Affairs Medical Center in Jackson, Mississippi (“Jackson
7 VA”). The Jackson VA providers treated his thromboembolic disease with the anticoagulation
8 (anti-clotting) medication Coumadin, which thins the blood to reduce the risk of clotting which
9 can cause a stroke. From approximately 2000 to 2006, Mr. Eason’s coagulation disorder was
10 primarily managed by Dr. Alice Paysinger, a clinical pharmacist at the Jackson VA Coagulation
11 Clinic.

12 Managing anticoagulation issues requires regular monitoring of a patient’s International
13 Normalized Ratio (“INR”), which is the standard unit for reporting the time it takes for blood to
14 clot. An INR below a patient’s target range is referred to as “subtherapeutic” and presents an
15 increased risk of clotting, while an INR above the target range is referred to as
16 “supratherapeutic” and presents an increased risk of bleeding. Mr. Eason’s target therapeutic
17 INR range was determined to be 2.0 to 3.0.

18 On November 15, 2006, Mr. Eason informed Dr. Paysinger that he was scheduled to
19 undergo tooth extractions later that month. His INR on this date was 2.19. She advised him to
20 hold his Coumadin for five days before the extractions and then resume Coumadin at higher
21 doses than normally prescribed for three days following the extractions to ensure that the proper
22 INR levels were maintained. In addition, he was to inject himself with Lovenox, an
23 anticoagulant that acts quickly when a person is subtherapeutic, for three days prior to and three
24 days after the extractions.

1 Mr. Eason returned to the clinic on December 12, 2006. His INR at that point measured
2 5.5 and, on re-test, 5.72. Dr. Paysinger instructed him to skip Coumadin for four days and then
3 restart at a lower dosage and scheduled him to return to the clinic seven days later.

4 At his return visit on December 19, 2006, Mr. Eason's INR was 1.05, the lowest it had
5 been in the years Dr. Paysinger had been treating him. The medical records for that visit
6 indicate Dr. Paysinger's understanding that Mr. Eason would be out of town until January 10,
7 2007. She instructed him to take one tablet of Coumadin that day and half a tablet daily
8 thereafter, and she scheduled him to return to the clinic on January 12, 2007.

9 Five days later, on December 24, 2006, Mr. Eason suffered a massive stroke. He was
10 transported to Hardy Wilson Memorial Hospital, from where he was then transferred to the
11 Jackson VA. Mr. Eason's INR at that time was 1.4. On January 23, 2007, Mr. Eason's family
12 transferred him by airlift to the Seattle VA, where he stayed for six weeks before being
13 discharged to the care of his daughter, Bridgette Jeffries.

14 The stroke left Mr. Eason in a near vegetative state. Ms. Jeffries, who is a trained
15 registered nurse, has cared for her father at her home ever since his discharge, with the assistance
16 of her grandmother, her children and her husband. The VA compensates Ms. Jeffries for two
17 hours a day at \$11.70 per hour for providing her father's bowel and bladder care. Mr. Eason
18 also receives 20 hours of care per week from a certified nurse aide authorized and paid for by the
19 VA.

20 On October 14, 2008, Ms. Jeffries, as guardian for Mr. Eason, filed a complaint for
21 medical negligence against the United States pursuant to the Federal Torts Claims Act, 28
22 U.S.C. § 1346(b).

23 **B. Analysis**

24 Rule 56 provides that summary judgment is appropriate "if the pleadings, the discovery
25 and disclosure materials on file, and any affidavits show that there is no genuine issue as to any
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1 material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
2 56(c). The moving party bears the burden “to show initially the absence of a genuine issue
3 concerning any material fact,” Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986) (quoting
4 Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970)), and all evidence must be viewed in the
5 light most favorable to the nonmoving party, Hawkins v. United States, 30 F.3d 1077, 1079 (9th
6 Cir. 1994). Once the moving party makes the required showing, the burden shifts to the
7 nonmoving party to come forward with sufficient evidence to demonstrate that there is a triable
8 issue of fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

9 The issue of defendant’s liability for medical negligence under the Federal Tort Claims
10 Act is governed by state law. Because Mississippi is the state in which the alleged negligent acts
11 took place, the substantive law of Mississippi controls any allegation of negligence. 28 U.S.C. §
12 1346(b)(1).

13 **1. Liability**

14 To establish a *prima facie* case of medical negligence under Mississippi law, a plaintiff
15 must prove that (1) the defendant had a duty to conform to a specific standard of conduct for the
16 protection of others against an unreasonable risk of injury; (2) the defendant failed to conform to
17 that standard; (3) the defendant’s breach of duty was a proximate cause of the plaintiff’s injury;
18 and (4) the plaintiff was injured as a result. Burnham v. Tabb, 508 So.2d 1072, 1074 (Miss.
19 1987). Mississippi adheres to a national standard of care in medical malpractice cases. Maxwell
20 v. Baptist Mem’l Hosp.-Desoto, Inc., 958 So.2d 284, 289 (2007).

21 **a. Violation of Standard of Care**

22 Plaintiff contends that defendant, through its agent Dr. Paysinger at the Jackson VA
23 Coagulation Clinic, violated the applicable standard of care on December 19, 2006 “by failing to
24 administer Lovenox in conjunction with the resumption of Mr. Eason’s Coumadin given his 1.05
25 INR level on that date.” Dkt. #9 at 13. Plaintiff further alleges that defendant violated the
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1 standard of care on that date “by not warning Mr. Eason of his stroke risks if his INR was not
2 rechecked within two or three days, and by scheduling his next appointment for January 12,
3 2006 without so advising him of those risks.” Id. Defendant responds that “factual issues
4 abound” regarding whether Dr. Paysinger violated the standard of care. Dkt. #21 at 5.

5 There is a strong argument that plaintiff has met her burden of proving that Dr. Paysinger
6 violated the applicable standard of care by failing to administer Lovenox upon Mr. Eason’s
7 December 19, 2006 visit to the clinic. Given his unusually low INR of 1.05, see Paysinger Dep.,
8 Dkt. #11, Ex. 2 at 96, and his medical history of stroke and deep vein thrombosis, all of the
9 proffered experts agree that Lovenox should have been the first line of defense against Mr.
10 Eason’s subtherapeutic INR level. Dr. Jennifer James, retained by plaintiff to opine on standard
11 of care issues, stated that the “standard of care called for CP Paysinger to instruct [Mr. Eason] to
12 maintain his previous stable dosing of Coumadin, to add Lovenox . . . to his Coumadin
13 beginning that day to raise the INR level, and to have him return to the coagulation clinic daily
14 or every other day for INR monitoring until he reached therapeutic INR levels.” James Decl.,
15 Dkt. #12, Ex. A at 4. According to Dr. James, Dr. Paysinger’s failure to do so was a “gross
16 violation of [the] standard of care.” Id. Upon deposition, Dr. James explained that while “[i]t
17 takes several days for Coumadin to have bioavailability,” Lovenox “acts quickly and is used as a
18 bridging dose” when a patient on Coumadin is subtherapeutic. James Dep., Dkt. #11, Ex. 9 at
19 57. Dr. Josephine Hao, also retained by plaintiff to opine on standard of care issues, agreed that
20 because Lovenox “results in an immediate anticoagulation effect,” Mr. Eason should have been
21 started on Lovenox therapy when his INR was 1.05. Hao Decl., Dkt. #13, Ex. B at 2. Dr. Hao
22 further testified that the standard of care requires a doctor to bridge any moderate-risk patient
23 with Lovenox when his INR is substantially below the target range, Hao Dep., Dkt. #11, Ex. 10
24 at 34; “Given tha[t] I consider [Mr. Eason] high risk, and to have an INR reading of 1.05, yes,
25 something should have been given to him to protect him while we start the Coumadin,” id. at 32.
26

1 Even defense expert Dr. Jeffrey Ward agreed that his first recommendation to Mr. Eason would
2 have been to start on Lovenox and re-test his INR in two days. See Ward Dep., Dkt. #11, Ex. 3
3 at 64-65, 68-69.¹

4 Dr. Ward did testify, however, that if Mr. Eason refused to return to the clinic within a
5 week, it would be inappropriate to begin a Lovenox treatment because it would require frequent
6 monitoring. See Ward Dep. at 65-66. Although Dr. Ward testified that he would “[p]robably”
7 have started Mr. Eason on Lovenox, id. at 64, he concluded that Mr. Eason’s Coumadin therapy
8 was not “performed in a negligent way,” Ward Decl., Ex. B at 8. “It is conceivable that [Mr.
9 Eason’s] stroke could have been prevented with aggressive use of Lovenox when he was shown
10 to be sub-therapeutic, but the patients [sic] poor compliance with this therapy, and a cavalier
11 attitude towards his anticoagulation . . . made that difficult if not impossible.” Id. But Dr.
12 Ward’s report may be based on a scenario that never actually occurred. It is not entirely clear
13 from the record whether Mr. Eason took his Lovenox as previously prescribed.² Dr. Ward’s
14 reference to Mr. Eason’s “cavalier attitude” reflects his perception that Mr. Eason refused to
15 return to the clinic within a week because of his travel plans. See Ward Dep. at 65-66. But
16 nothing in Dr. Paysinger’s medical records suggests that Mr. Eason dug his heals in to such an
17 extent that a Lovenox treatment would have been impossible. The record reveals only Dr.
18 Paysinger’s understanding that Mr. Eason would be out of town until January 10, 2007. Dkt.
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20

21 ¹ Although Dr. Ward was retained by defendant to opine on standard of care issues, see Ward
22 Decl., Dkt. #25 at 1, at his deposition he testified that he is “not familiar” with the standard of care for a
23 pharmaceutical Ph.D. running a VA anticoagulation clinic in Mississippi, Ward Dep. at 61; see also id.
24 at 62.

25 ² At his deposition, Dr. Ward testified that Mr. Eason “[p]robably” took his Lovenox and
26 “assume[d] . . . that Dr. Paysinger did not have a reason to think that he was noncompliant with the
Lovenox when she made further decisions for his anticoagulation.” Id. at 56.

1 #11, Ex. 5 at 2. There is no indication when Mr. Eason planned to leave town³ or whether Dr.
2 Paysinger even warned him that failure to take Lovenox and return to the clinic within a few
3 days would create a risk of stroke.⁴ Because the Court will be the trier of fact at the bench trial,
4 it finds that these issues are better left for determination after it has heard from the proffered
5 witnesses.

6 In addition, there remains a question as to whether Dr. Paysinger's failure to prescribe
7 Lovenox was because of Mr. Eason's travel plans and his refusal to comply or whether she
8 deliberately chose not to administer Lovenox because she did not believe Mr. Eason's condition
9 warranted it. Dr. Paysinger "felt that it was more of a risk to give him the Lovenox at that time"
10 given his previously supratherapeutic INR. Paysinger Dep. at 94. As Dr. Paysinger was
11 concerned about the potential for bleeding, she did not prescribe Lovenox despite Mr. Eason's
12 INR of 1.05.⁵

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14 ³ In fact, Mr. Eason was still in town five days later when he had his stroke. While Dr.
15 Paysinger stated in her declaration that she advised him to return to the clinic "within one week,"
16 Paysinger Decl., Dkt. #23 ¶3; see also id. ¶ 4, in her deposition she testified that she told him to come
17 back "in a week," Paysinger Dep. at 96, 97. It does not appear that Dr. Paysinger further questioned Mr.
18 Eason about precisely when he would be leaving town. See id. at 97 ("All I know is that when I asked
him to come back in a week, he said he couldn't come back.").

19 ⁴ Although Dr. Paysinger stated that she warned Mr. Eason of the risks of not returning within a
20 week to have his INR checked, she did not record that discussion in his chart. Paysinger Decl. ¶ 5. Dr.
21 Alice Wen, plaintiff's expert, testified that the standard of care required Dr. Paysinger to document her
22 instruction and the fact that Mr. Eason was not adhering to her medical advice. Wen Dep., Dkt. #29, Ex.
23 1 at 63, 65; see also Ward Dep. at 77 ("I agree that she should have warned him and it certainly would
24 have been prudent to have documented it.").

25 ⁵ It appears that Dr. Paysinger's concern over Mr. Eason's December 12, 2006 INR of 5.72 took
26 precedence over her concern for his December 19, 2006 INR of 1.05. Not only did she choose not to
prescribe Lovenox, but also she reduced Mr. Eason's Coumadin dosage even though his most recent
INR showed he was subtherapeutic. See Wen Dep. at 41 ("I can't think of any reason why a person
would reduce the dose with an INR of 1.05."); Hao Decl., Ex. B at 2 ("The standard of care would
require an increase in dosage in response to an INR of 1.05[.]").

1 To the extent defendant contends that Dr. Paysinger properly exercised her professional
2 judgment given that Coumadin management is “as much an art as a science,” Dkt. #21 at 6
3 (quoting Ward Decl., Ex. B at 8), the present analysis of the objective standard of care leaves no
4 room for subjective assessments of Dr. Paysinger’s intentions.

5 The appropriate standard of care in a medical malpractice case is objective and
6 centers around exercising the degree of care, diligence, and skill ordinarily
7 possessed and exercised by a minimally competent and reasonably diligent,
8 skillful, careful, and prudent physician in that field of practice. What the physician
9 may have been thinking in “his best judgment” is irrelevant. What the physician
did in treating the patient is the key factor. Patients expect their physician to
always be exercising “their best judgment.” However, it is clear that there are
times where the physician’s best judgment regarding treatment falls below the
applicable standard of care.

10 Bickham v. Grant, 861 So.2d 299, 303 (Miss. 2003). The record strongly suggests that Lovenox
11 was the best way to achieve immediate anticoagulation once Mr. Eason presented with a
12 significantly low INR and that, in failing to prescribe Lovenox, Dr. Paysinger failed to abide by
13 the applicable standard of care. However, in light of the lingering fact questions, the Court
14 defers determination of the issue so that it may examine all of the evidence at the upcoming
15 bench trial.

16 Moreover, whether Dr. Paysinger independently violated the standard of care by not
17 advising Mr. Eason to return to the clinic sooner remains an issue of fact. Regardless of whether
18 Dr. Paysinger warned Mr. Eason that he should return “within one week” or “in a week,” see
19 supra n.3, she testified that she did not think it was appropriate for him to return as early as
20 Friday, December 22, 2006, see Paysinger Dep. at 97 (“I felt that . . . it would give us
21 information that wouldn’t be useful.”). While the experts unanimously agree that a Lovenox
22 treatment would have required the patient to return within a few days, it is not clear whether the
23 standard of care required Mr. Eason to return before December 22, 2006 without a Lovenox
24 prescription. See Hao Decl., Ex. B at 2 (“[A]rrangements should have been made at an
25 alternative VA anticoagulation therapy center to monitor Mr. Eason and recheck his INR on or
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1 around Friday, December 22, 2006.”); Wen Dep. at 41 (“In Mr. Eason’s case, minimally three
2 days; maximally a week.”); Ward Dep. at 70-71 (“Either Thursday or Friday, and that’s if . . .
3 I’m giving them Lovenox. If they aren’t and I think I know what their appropriate Coumadin
4 dose is then I may not bring them back that quickly.”).

5 **b. Causation**

6 Under Mississippi law, “[t]he plaintiff must introduce evidence which affords a
7 reasonable basis for the conclusion that it is more likely than not that the conduct of the
8 defendant was a cause in fact of the result.” Burnham, 508 So.2d at 1074. Plaintiff’s expert on
9 causation unequivocally stated that “Mr. Eason’s stroke and vegetative state were caused solely
10 and directly by the failure of VA/Jackson to meet national standards of care to immediately and
11 properly treat Mr. Eason’s volatile and subtherapeutic INR levels.” James Decl., Ex. A at 4; see also
12 James Dep. at 71 (“Q: If Mr. Eason had been given Lovenox on 12/19/06, would he not
13 have had a stroke? A: That’s my belief.”).

14 But while all of the experts agree that Mr. Eason’s low INR could have caused his stroke,
15 their opinions open the door to other potential causes as well. For instance, Dr. Marc Kirschner,
16 retained by defendant to opine on causation issues, agreed in his deposition that “more likely
17 than not, more probably than not, one of the causes of [Mr. Eason’s] stroke was that he was
18 subtherapeutic in his Coumadin therapy.” Kirschner Dep., Dkt. #11, Ex. 7 at 13. But in his
19 declaration, he points to other potential causes of the stroke, including Mr. Eason’s history of
20 atherosclerotic disease, hypertension and smoking, and his use of alcohol and barbiturates.
21 Kirschner Decl., Dkt. #24, Ex. B. at 7.⁶ Dr. Ward also testified, “I think the proximate cause was
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23 ⁶ The extent of alcohol present in Mr. Eason’s system at the time of his stroke is itself an open
24 question. Although Dr. Kirschner originally noted that Mr. Eason “had alcohol levels compatible with
25 acute intoxication,” Kirschner Decl., Ex. B at 7, he later clarified that “Mr. Eason’s alcohol level on
26 December 24, 2006 was not as high as I believed it was when I initially prepared my report, *id.* ¶ 4. Dr.
Ward seemed to suggest in his deposition that the “alcohol issue” could be put “to rest.” Ward Dep. at

1 his low INR,” Ward Dep. at 81, but acknowledged that “it may have been multifactorial” given
2 Mr. Eason’s history of vascular disease and age, *id.* Plaintiff’s expert Dr. Cynthia Smyth
3 testified that the “major cause” of Mr. Eason’s stroke was the failure to administer Lovenox,
4 Smyth Dep., Dkt. #22, Ex. H at 82, but upon further questioning, she acknowledged “that the
5 cause could be described as multifactorial” in light of Mr. Eason’s history of smoking, high
6 cholesterol, hypertension, atherosclerotic disease, age and coagulation disorder, *id.* at 82-84.

7 In sum, while there is strong evidence indicating that defendant’s violation of the standard
8 of care was a significant factor leading to Mr. Eason’s stroke,⁷ viewing it in the light most
9 favorable to defendant, there remains a genuine dispute regarding whether that violation was a
10 proximate cause of the injury.

11 **2. Damages**

12 Defendant filed the present motion seeking to limit the damages plaintiff may recover as
13 follows: (1) non-economic damages should be capped at \$500,000; (2) past medical expenses are
14 not recoverable given that they were paid for or reimbursed by the VA; (3) future medical
15 expenses should be limited to out-of-pocket expenses for services not available from the VA;
16 and (4) future medical expenses, to the extent any are not provided by the VA, should be further
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18 47. Moreover, the effect of the positive barbiturate reading in Mr. Eason’s system on his INR level
19 remains unknown. Dr. Kirschner opined that “it is not unlikely that such medication combinations
20 (alcohol and barbiturates) could result in a prothrombotic state, thus leading to the complications that
21 ensued.” Kirschner Decl., Ex. B at 7. But it is unclear how the later-revealed decreased alcohol level
22 affects this analysis. Additionally, while Dr. Wen testified that “[b]arbiturates have documented
23 interactions that can lower the INR,” Wen Dep. at 54, Dr. Hao stated that “[b]arbiturates and alcohol
24 would only increase the INR findings, if they had any impact at all,” Hao Decl., Ex. B at 2.

25 ⁷ Indeed, at oral argument defendant conceded that plaintiff need only prove that the violation of
26 the standard of care was *a proximate cause*. See Entrican v. Ming, 962 So.2d 28, 32 (Miss. 2007)
(quoting Foster v. Bass, 575 So.2d 967, 992 (Miss. 1990)) (“[T]o be held liable, a person ‘need not be
the sole cause of an injury. It is sufficient that his negligence concurring with one or more efficient
causes, other than the plaintiff’s, is the proximate cause of the injury.’”).

1 limited according to Mr. Eason's approximate life expectancy of five years. Additionally,
2 defendant seeks to preclude Ms. Jeffries from asserting a loss of consortium claim.⁸

3 **a. Non-economic Damages**

4 Defendant first asks that the Court limit the non-economic damages plaintiff may seek to
5 \$500,000. Dkt. #8 at 5. While there is no dispute that Mississippi law caps non-economic
6 damages in medical malpractice cases filed after September 4, 2001 at \$500,000, Miss. Code
7 Ann. § 11-1-60(2)(a), plaintiff contends that the applicability of the cap is not yet ripe for
8 adjudication, Dkt. #19 at 6. Mississippi law further provides that “[t]he trier of fact shall not be
9 advised of the limitations imposed by this subsection (2) and the judge shall appropriately reduce
10 any award of noneconomic damages that exceeds the applicable limitation.” Miss. Code Ann. §
11 11-1-60(2)(c). Thus, while the statute requires the Court to limit an excessive award of non-
12 economic damages to ensure compliance with the statutory cap, it does not limit the fact finder's
13 consideration of any amounts above that cap. Cf. Bridges v. Enterprise Products Co., Inc., 2007
14 WL 571074 at *3 (S.D. Miss. Feb. 20, 2007). While the Court is aware of its obligation to cap
15 non-economic damages at \$500,000, it sees no need to foreclose argument at trial that the actual
16 amount incurred exceeds \$500,000.

17 Therefore, defendant's motion for partial summary judgment regarding the \$500,000 cap
18 on non-economic damages is denied.

19 **b. Past Medical Expenses**

20 Defendant next contends that plaintiff cannot recover past medical expenses because they
21 were provided by the VA. Dkt. #8 at 6. Defendant further maintains that plaintiff has not
22 produced any evidence of medical expenses paid out-of-pocket and not reimbursed by the VA,
23 so she should be precluded from seeking recovery of past medical expenses. Id. Plaintiff states

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25 ⁸ Plaintiff indicated in her response that she does not intend to pursue a loss of consortium claim
26 at trial, therefore this issue is moot.

1 that she “is not seeking any award for past medical expenses that have already been paid by the
2 VA,” but maintains that she has produced evidence of un-reimbursed, out-of-pocket expenses.
3 Dkt. #19 at 8. Specifically, plaintiff states that the VA has not paid for the cost of a visit to the
4 Providence Everett Medical Center emergency room, a special vest used to break up secretions
5 in Mr. Eason’s chest, and the services gratuitously provided by Mr. Eason’s family members.

6 Id. at 8-9.

7 The Court finds that an issue of fact remains as to whether plaintiff was reimbursed for
8 the cost of the trip to the emergency room. Although plaintiff has not provided documentation
9 of this out-of-pocket expense, Ms. Jeffries did testify that she knows she paid something toward
10 the cost of the ambulance. Jeffries Dep., Dkt. #20, Ex. 1 at 91-92. While the actual amounts
11 owed are not crystal clear at this time, it is obvious that the existence of past out-of-pocket
12 expenses is an issue of material fact and therefore not appropriate for summary judgment.

13 Because neither plaintiff nor a collateral source such as Medicare has actually paid for
14 Mr. Eason’s vest, this expense does not qualify as a past medical expense. Rather, the vest falls
15 under the category of future medical expenses.

16 The parties dispute whether the care gratuitously provided by Mr. Eason’s daughter and
17 other family members is compensable, although their analysis of the legal authority on the issue
18 is minimal. Plaintiff cites Clary v. Global Marine, Inc., 369 So.2d 507, 509 (Miss. 1979) for the
19 “general principle of [the] collateral source rule that gratuitous care will not be deducted from
20 recovery of damages.” Dkt. #19 at 9. Defendant attacks Clary as “inapposite” given that it
21 applied federal law, Dkt. #28 at 5, but provides no case law contradicting plaintiff’s assertion
22 that she should be compensated for her family’s gratuitous care.

23 Clary does state “as a general rule” that “the fact that the plaintiff received gratuitous
24 medical care, continued salary or wage payments, proceeds from insurance policies, or welfare
25 or pension benefits, will not be taken into account when computing damages.” 369 So.2d at 509

1 (citing 22 Am.Jur.2d Damages § 206 (1965)). Because Clary was an action in admiralty, the
2 court considered federal law, but it did note that “Mississippi has a ‘collateral source’ rule under
3 which compensation received by a plaintiff from a collateral source wholly independent of
4 wrongdoer cannot be set up in mitigation or reduction of damages.” Id. at 510 n.2 (citing Coker
5 v. Five-Two Taxi Serv., 52 So.2d 356 (1951)). Clary, however, held only that “the plaintiff’s
6 recovery will not be reduced by the fact that the medical expenses were paid by some source
7 collateral to the defendant,” id. at 509; it did not specifically address or analyze gratuitous
8 services provided by a family member. The Court’s review of Mississippi case law, however,
9 yielded several cases finding that an employer found liable in a workers’ compensation claim is
10 required to pay for the services provided by a family member. See Mississippi Transp. Comm’n
11 v. Dewease, 691 So.2d 1007, 1012 (Miss. 1997) (“It is well-established that nursing care
12 provided by a relative to an injured claimant is compensable as a medical benefit pursuant to
13 Miss. Code Ann. § 71-3-15(1)[.]”); City of Kosciusko v. Graham, 419 So.2d 1005, 1009 (Miss.
14 1982); Babcock & Wilcox Co. v. Smith, 379 So.2d 538, 539 (Miss. 1980) (“[p]ractical nursing
15 services over and above that called for by the ordinary duties of a wife in a normal home may be
16 compensated as medical services under the Mississippi Workmen’s Compensation Law.”).

17 Moreover, the Court’s review of analogous cases from other jurisdictions reveals that “a
18 majority of the courts have held that the plaintiff is entitled to recover the reasonable value of
19 such services, because a failure to account for the value of these services would provide the
20 tortfeasor with an undeserved windfall.” Stein on Personal Injury Damages § 7:11 (3d ed.).⁹ If
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22 ⁹ See Spiker v. John Day Co., 270 N.W.2d 300, 311 (Neb. 1978) (“The employer-insurer should
23 not be allowed to profit from the gratuitous care, given out of love, to an injured employee by his
24 spouse, when it was the employer which forced the care of the employee upon the spouse.”); Klapac’s
25 Case, 242 N.E.2d 862, 864 (Mass. 1968) (existence of marital relationship did not bar wife from
receiving payment for nursing services rendered to husband disabled from employment); Brinson v.
Southeastern Utilities Serv. Co., 72 So.2d 37, 39 (Fla. 1954) (increasing damages award for wife’s
26 services to injured husband in view of evidence that he “required constant attention and aid”); Leglar v.

1 Mr. Eason's family were not attending to his daily needs by feeding him, bathing him,
2 administering his medication, and performing countless other chores, see Jeffries Dep. at 44-62,
3 hired professionals would have to do so, and there would be no dispute that defendant would be
4 liable for those amounts. Defendant cannot disclaim responsibility merely because Mr. Eason is
5 fortunate enough to have a family that is willing and able to take on the burden of his care.

6 Therefore, defendant's request that plaintiff be precluded from seeking recovery for past
7 medical expenses is denied.

8 **c. Future Medical Expenses**

9 Defendant next asserts that plaintiff should not be allowed to recover future medical
10 expenses provided by the VA or that the VA could provide if requested to do so. While plaintiff
11 cites the collateral source rule to claim that defendant should not be allowed to offset the VA
12 benefits to which Mr. Eason is entitled against its liability for future medical expenses, defendant
13 contends that the collateral source rule does not apply since the United States is the source of
14 both the damages and the VA medical services.

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17 Muscatine Clinic, 223 N.W. 405, 407 (Iowa 1929) (trial judge had "correctly permitted recovery for
18 compensation for nurses, whether members of the family or not"); Houston & T.C.R. Co. v. Gerald, 128
19 S.W. 166, 170 (Tex App. 1910) ("If the wife had been indifferent to the suffering of her husband, and
refused to nurse him, thereby compelling him to hire a stranger to nurse him, it would not be contended
20 that he could not recover the reasonable wages that he had paid for such services. Is it against public
policy to allow the same recovery for the same services rendered by a loving wife? We think not.");
21 Beringer v. Dubuque S.R. Co., 91 N.W. 931, 933 (Iowa 1902) (jury allowed to consider value of nursing
services supplied by adult daughter to her injured mother even though plaintiff did not actually pay or
22 become obligated to pay for them); Howells v. North Am. Transp. & Trading Co., 64 P. 786, 787 (Wn.
23 1901) (husband can recover for his services in attending his wife the value of the services of a
competent nurse). But see Goodhart v. Pennsylvania R. Co., 35 A. 191, 192 (Pa. 1896) ("The plaintiff
24 cannot recover for the nursing and attendance of the members of his own household, unless they are
hired servants. The care of his wife and minor children in ministering to his needs involves the
25 performance of the ordinary offices of affection, which is their duty; but it involves no legal liability on
his part, and therefore affords no basis for a claim against a defendant for expenses incurred.").

1 In Molzof v. United States, 502 U.S. 301 (1992), the government similarly argued that a
2 damages award for future medical care would be duplicative of the free medical services already
3 being provided by the veterans' hospital and therefore unlawfully punitive. The Supreme Court
4 concluded that awarding future expenses in the light of free care was not punitive, id. at 312, and
5 remanded the case for a determination on whether those amounts were recoverable under
6 Wisconsin law, id.

7 On remand, the Seventh Circuit held that the plaintiff was entitled to an award for future
8 medical expenses. Molzof v. United States, 6 F.3d 461, 468 (7th Cir. 1993).¹⁰ The Seventh
9 Circuit "share[d] the reluctance of other courts addressing this issue to deny the plaintiff the
10 freedom to choose his medical provider and, in effect, to compel him to undergo treatment from
11 his tortfeasor." Id.; see Ulrich v. Veterans Administration Hosp., 853 F.2d 1078, 1084 (2d Cir.
12 1988) ("[A veteran] is not obligated to seek medical care from the party whose negligence
13 created his need for such care simply because that party offers it without charge."); Feeley v.
14 United States, 337 F.2d 924, 935 (3d Cir. 1964) ("To force a plaintiff to choose between
15 accepting public aid or bearing the expense of rehabilitation himself is an unreasonable
16 choice."). The Seventh Circuit held that "the Wisconsin Supreme Court would deem these
17 benefits collateral," id. at 466, relying on two state cases that found that federally-funded health
18 care is given in consideration of a veteran's service to his country, id. at 466-67. "Thus, under
19 Wisconsin law, these benefits are analogous to traditional employee health benefits whereby an
20 employee secures health benefits by contributing part of his salary to sustain the program. . . .
21 Accordingly, we think it clear that Wisconsin law would treat these benefits as collateral to an
22 award under the FTCA." Id. at 467.

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¹⁰ Defendant concedes, as it must, that it originally misstated the Supreme Court's holding in
25 Molzof and ignored the fact that Seventh Circuit's original holding, 911 F.2d 18 (7th Cir. 1990), was
26 overturned on remand in 1993.

1 While Mississippi does have a firmly established collateral source rule, see Coker v. Five-
2 Two Taxi Serv., 52 So.2d 356 (1951), the Court has found no Mississippi law akin to the
3 Wisconsin cases finding that a veteran's health care is given in consideration for his service.
4 However, the Seventh Circuit's reasoning in Molzof is persuasive. The Seventh Circuit found
5 that "the veteran has contributed to the medical benefits," Molzof, 6 F.3d at 468; "[i]n the case
6 of veterans, the consideration is his service and, in all likelihood, a lower salary to sustain the
7 program," id. at 467. Even though the United States is the ultimate provider of both health care
8 and damages, the nature of the former is "as a payment from defendant as insurer to the plaintiff
9 insured," while the nature of the latter is "as payment from defendant as tortfeasor to the plaintiff
10 as the party injured by the defendant's negligence." Id. at 465 (quoting Karsten v. Kaiser
11 Foundation Health Plan, Inc., 808 F.Supp. 1253, 1258 (E.D. Va. 1992)). It is not evident that
12 plaintiff's health care options should be limited by the fact that his insurer and tortfeasor are one
13 in the same.

14 On the other hand, Mississippi case law may indicate a policy preference against double
15 recovery for the plaintiff. In Daves v. Reed, 222 So.2d 411, 416 (Miss. 1969), the Mississippi
16 Supreme Court held that amounts paid by the defendant's insurance company to the plaintiff
17 may be credited against the amount of damages which the plaintiff is entitled to recover from the
18 defendant-insured. "The payments come not from a collateral source but from defendant. . . .
19 Since the entire right is purchased by him, he gets no 'windfall' when he is allowed to credit
20 medical payments against the medical portions of the general award." Id. The court also found
21 that "the injured person should not be allowed a double recovery for his medical expenses
22 already recovered in this way." Id.; see also Pearl Pub. School Dist. v. Groner, 784 So.2d 911,
23 916 (Miss. 2001) (applying Daves holding to claim filed under Mississippi Torts Claims Act).
24 While the circumstances in Daves refer to past medical expenses, the court expressed concern
25 for forcing a defendant to pay twice from two different funds. In the present case, if plaintiff
26

1 were to choose to continue receiving care from the VA, defendant would be paying twice for his
2 medical care, albeit from different purses. The Court sees no indication from the Mississippi
3 courts that Mississippi law would condone a situation allowing plaintiff double recovery for his
4 medical benefits.¹¹

5 The Court defers its decision on the issue of future medical expenses until after the
6 upcoming bench trial, at which point it will grapple with this difficult question if it determines
7 that defendant is liable and damages should be awarded.

8 **d. Life Expectancy**

9 Finally, defendant asks the court to determine as a matter of law that Mr. Eason's life
10 expectancy is at most five years. Defendant cites a single Idaho case for the proposition that
11 "[w]here the determination of a plaintiff's life expectancy is outside the competence of an
12 average layperson or juror, expert testimony is required." Dkt. #8 at 9 (citing Slack v. kelleher,
13 104 P.3d 958 (Idaho 2004)). Defendant has arrived at its five-year estimate through its
14 designated expert Dr. Scott Kush, a medical researcher in the area of life expectancy, who based
15 this opinion on Mr. Eason's medical history and a literature review on the subject. Defendant
16 contends that plaintiff's failure to offer expert testimony regarding life expectancy into evidence
17 precludes plaintiff from arguing otherwise. Plaintiff maintains that she intends to call Mr.
18 Eason's treating physicians to testify regarding Mr. Eason's current medical status, his
19 prognosis, the quality of care he is receiving, and how that care impacts his life expectancy.
20 Dkt. #19 at 16. Plaintiff also relies on actuarial tables issued by the Office of the Washington
21 State Insurance Commissioner.

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24 ¹¹ Cf. United States v. Hayashi, 282 F.2d 599, 603 (9th Cir. 1960) (injury-related benefits paid
25 from unfunded general revenues are to be deducted in determining amount of award for pecuniary loss
26 in FTCA action but similar benefits paid from a special fund source to which the plaintiff has
contributed are not).

The Court sees no reason to determine Mr. Eason's life expectancy as a matter of law. In Slack, the Idaho Supreme Court found that defendant was required to produce expert testimony that the plaintiff's medical condition would shorten her life expectancy, 104 P.3d at 965, even though the plaintiff herself did not offer any expert testimony on the issue, indicating that the defendant bore the burden of proof that the plaintiff would not live a normal life expectancy. Moreover, defendant has provided no basis for the Court to find that actuarial tables are irrelevant or inadmissible at trial. See Churchill v. Pearl River Basin Development Dist., 757 So.2d 940, 945 (Miss. 1999) (evidence of the plaintiff's life expectancy in the form of tables should be admitted).

Therefore, the Court denies defendant's request to preclude evidence and testimony regarding Mr. Eason's life expectancy at trial.

III. CONCLUSION

For all of the foregoing reasons, the Court DENIES plaintiff's motion for partial summary judgment (Dkt. #9) and DENIES defendant's motion for partial summary judgment (Dkt. #8).

DATED this 28th day of September, 2009.

Mrs Casnik

Robert S. Lasnik
United States District Judge